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CHARLES ELMORE GROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 1344-1345

HUMBLE OIL & REFINING COMPANY, ET AL.,
Appellants,

vs.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees

ON APPEALS FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

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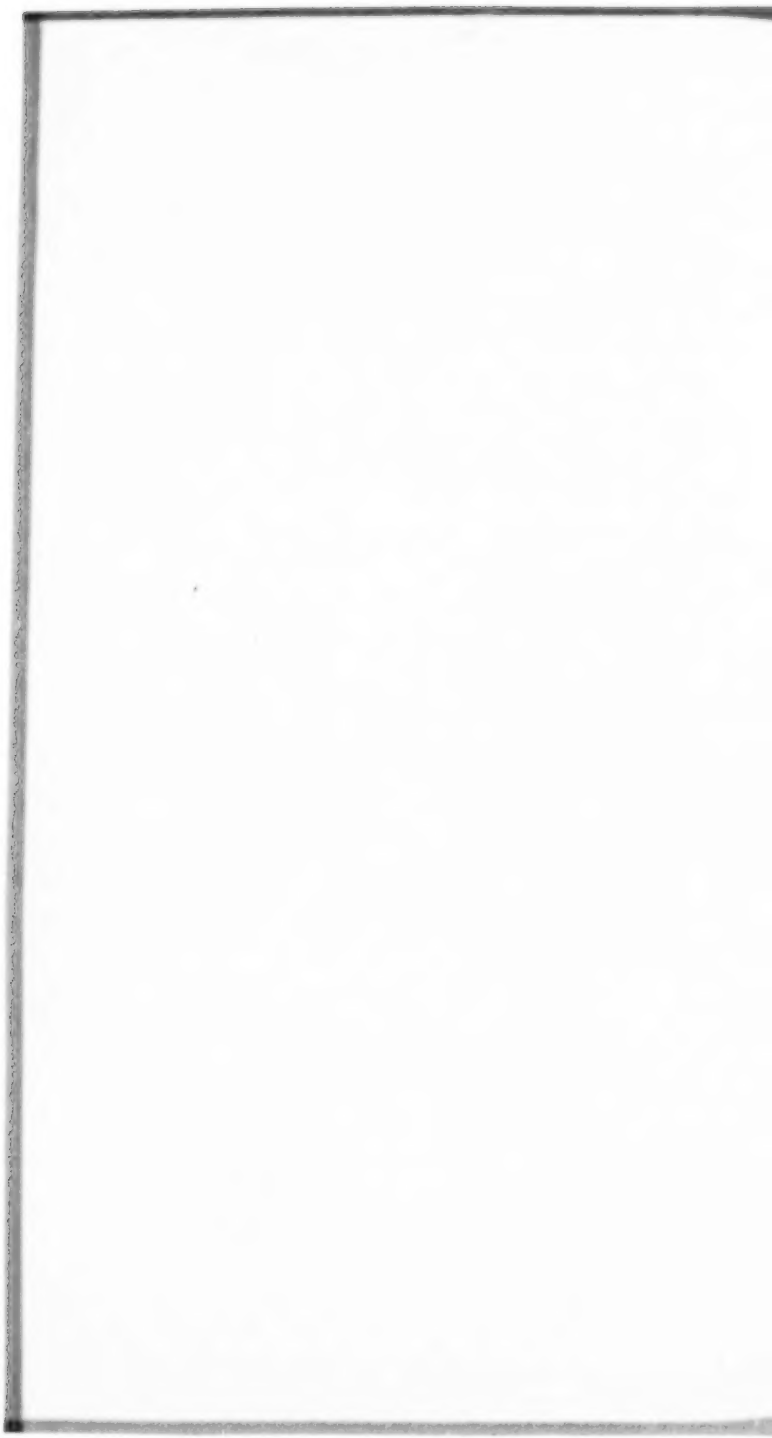

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APPELLEES' OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM

The appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Charles F. Ashcroft, et al., respectfully submit this statement and motion to dismiss or affirm, under Rule 12 of the Rules of this Court, and say:

Summary Statement of Appellees' Contentions

(1) *The questions presented by the appeal are not substantial, because they have already been settled adversely to appellants by the decisions of this Court in Railroad*

Commission v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 614; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Railroad Commission* v. *Humble Oil & Refining Co.*, 311 U. S. 578.

(2) *The Texas courts having decided that appellants' property rights, as determined by the Texas law of property, are not being denied or confiscated, the decision of the Texas courts rests upon an adequate and substantial non-federal ground.*

This case presents the question of the validity under the Fourteenth Amendment of a proration order of the Railroad Commission for the Hawkins field dividing the allowable production of oil among the various operators on what is popularly known as a 50-50 basis—that is, 50% per well and 50% on the basis of acreage. Appellants' essential complaint against the proration formula is that it gives too much weight to the per-well factor and not enough weight to the acreage factor, with the result that the appellants on their large tracts are allowed to recover less, and the townsite operators on their small tracts are permitted to recover more, than they would recover if the production were allocated in proportion to estimates of recoverable oil in place beneath their respective tracts.

It is the appellees' position that under earlier decisions by this Court, the Railroad Commission's order is reasonable and well within the limits of the Railroad Commission's proper discretion, and that, the Texas courts having decided that none of appellants' property rights are being denied to them, the case turns on a question of Texas property law on which the decision of the Texas courts is final.

I

The Questions Raised by Appellants Have Been Decided Adversely to Them by Earlier Decisions of This Court

An examination of the opinions in the *Rowan & Nichols* and *Humble* cases, cited above, and a comparison of the facts in those cases with the facts in this case, will show that substantially the same attacks were made there upon proration orders much less favorable to the owners of large tracts than the order in this case, and that this Court specifically rejected the claims of unconstitutionality there presented.

Earlier Decisions by This Court

1. *First Rowan & Nichols Case*

In the first *Rowan & Nichols* case, 310 U. S. 573, the order, relating to the East Texas field, was substantially "on a flat per well basis" (See 310 U. S. at pp. 578, 582). The validity of the order under the Fourteenth Amendment was specifically attacked (See 310 U. S. at p. 577). The complaint against the order was that it permitted "other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands" (See 310 U. S. at p. 578), and that the result of the order was to give "a constitutionally inadmissible advantage to smaller and more densely drilled tracts as against those owned by respondent" (See 310 U. S. at p. 582).

Rejecting these claims of unconstitutionality, and recognizing the implications of "the rule of capture" as an integral part of the law of property in oil and gas in Texas, this Court held that "a flat per well allowance to these producers was not an unnatural answer to the problem" (See 310 U. S. at p. 583) and that, "It is not for the federal

courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better" (See 310 U. S. at p. 584).

2. *Second Rowan & Nichols Case*

In the second *Rowan & Nichols* case, 311 U. S. 570, the court was confronted with a proration order, again relating to the East Texas field, which was somewhat more favorable to the larger tracts than the order involved in the first case. Instead of being about 98% on a per-well basis, as in the first order, the second order was about 75% on a per-well basis and 25% on other factors, including acre feet of sand (See 311 U. S. at p. 574). Rejecting again the contention that the small tracts were unduly favored and that the per-well allowable "constituted an illegitimate discrimination against high producing and thinly drilled areas" (See 311 U. S. at p. 574), this Court reversed the judgment of the lower court and ordered the dismissal of the complaint. In the course of its opinion, this Court pointed out the following considerations as being relevant to the problem of the small tracts (See 311 U. S. at pp. 574-575):

> "The surface is often divided into small tracts, and the Commission, acting under the authority of the Texas statutes, has permitted the drilling of wells by small owners in order to prevent practical forfeiture of their interests. Small producers have investments in existing wells with low capacities, and these wells need a minimum daily production to justify their enterprise. In addition to all this, any scheme of proration duly mindful of all those considerations, hardly mathematically commensurable, which constitute the total well-being of a society, must assure the continued operation of a sufficient number of wells for an adequate exploitation of the state's oil resources."

3. *The Humble Case*

The *Humble* case, 311 U. S. 578, was a companion case to the second *Rowan & Nichols* case, involving the same proration order, and the Court disposed of it in a brief opinion, referring to that case.

The Present Case

1. *Summary of Proceedings in State Courts*

Following the repulses of the attacks on proration orders in the federal courts in the *Rowan & Nichols* and *Humble* cases, the forum for the settlement of the controversy over proration was shifted back to the Texas courts. In *Marrs* v. *Railroad Commission,* 142 Tex. 293, 177 S. W. (2d) 941, the Supreme Court of Texas set aside a proration order for the McElroy field because the order did not, in the opinion of the court, give proper weight to (a) the potential productivity of the complainant's wells under unrestricted conditions and (b) to the relative proportion of the recoverable reserves of oil in place beneath their tracts.

Shortly after the decision in the *Marrs* case, the present case was brought by Humble and some of its royalty owners attacking the proration order in the Hawkins field. The District Court after a lengthy trial, set the proration order aside. The Court of Civil Appeals, after holding that procedural errors had occurred in the District Court which otherwise would have required a new trial, held further that the evidence, when viewed most favorably to the Humble and its royalty owners, did not justify the setting aside of the Railroad Commission's order, under the holding in the *Marrs* case, and therefore reversed and rendered the judgment of the District Court. *Railroad Commission* v. *Humble Oil & Refining Co.,* 193 S. W. (2d) 824. Applications for writs of error were made to the Supreme Court of Texas

by Humble and its royalty owners. In the meantime, the Supreme Court of Texas, after the decision in the *Marrs* case, in two decisions involving the well-spacing rules, held that orders of the Railroad Commission of Texas under the oil and gas conservation statutes will not be set aside by the courts if such orders are supported by substantial evidence showing such orders to be reasonable. *Thomas* v. *Stanolind Oil & Gas Co.*, 198 S. W. (2d) 420; *Trapp* v. *Shell Oil Co., Inc.*, 198 S W. (2d) 424 (Original opinions, May 15, 1946; motions for rehearing overruled November 27, 1946).[1] On December 18, 1946, the Supreme Court of Texas, in the present case, denied the applications for writs of error with the docket notation, "Refused. No reversible error" (R. 2231), the judgment reciting that the Supreme Court of Texas finds "that the applications present no error which requires a reversal of the judgment of the Court of Civil Appeals . . ." (R. 2067, 2103).

The appellants, Floy K. Williams, et al., are incorrect in stating on page 12 of their Jurisdictional Statement (R. 2185) that the applications for writs of error were denied with the simple notation, "Refused." This is material under the Texas practice, because of the provisions of Rule 483 of the Texas Rules of Civil Procedure (Vernon's 1946 Supplement), which provides in part as follows:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' *In all cases where the Supreme Court is not satisfied with the*

[1] Compare the decisions of this Court applying the substantial evidence rule to cases involving attacks on orders of federal administrative agencies. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Federal Security Administration* v. *Quaker Oats Co.*, 318 U. S. 218; *Federal Communications Commission* v. *WOKO, Inc.*, 328 U. S. — (No. 65, October Term, 1946, decided December 9, 1946).

opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation '*Refused. No reversible error.*'"[2]

The action of the Supreme Court of Texas in the present case therefore is not an endorsement by the Supreme Court of all of the principles of law announced or relied upon by the Court of Civil Appeals. In fact, the notation made by the Supreme Court of Texas necessarily means that in some respects the Supreme Court of Texas did not approve of the reasons given by the Court of Civil Appeals in its opinion, although the Supreme Court of Texas did agree with the result reached by the Court of Civil Appeals. All that can be said with certainty is that upon the whole record the Supreme Court of Texas decided that as a matter of law the evidence showed that the Railroad Commission's order was within the discretionary powers of the Railroad Commission and should not be set aside. The decision of the present case by the Texas courts cannot be said to rest (as appellants contend, Humble's Jurisdictional Statement, pp. 17, 21, R. 2138, 2142; Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183) upon any single declaration of law by the Court of Civil Appeals, such as its reference to the compensatory factor of the saving of drilling costs to the Humble, as supporting the present order; but, on the contrary, the validity of the order as sustained by the Texas courts must be said to rest upon its reasonableness in the light of the entire record and upon a consideration of all relevant factors. We shall discuss the order upon this basis, in view of the earlier decisions of this Court.

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[2] All emphasis in this motion is ours.

2. *Comparison of Facts in This Case with Facts in Earlier Decisions of This Court*

The essential complaint asserted by the Humble and its royalty owners is the same as the complaint in the cases previously decided by this Court: viz., that the order allocates too much of the allowable on a per-well basis rather than on the basis of acreage or acre-feet of sand, resulting in a recovery by wells on small tracts of more than their fair share of the recoverable oil. The clear applicability to the present case of the reasoning followed by this Court in its previous decisions is shown by the following comparisons:

(a) *Approximate percentage of allowable production distributed on a per well basis:*

First *Rowan & Nichols* case—98%
Second *Rowan & Nichols* case—75%
Present case—50%

(b) *Approximate percentage of allowable production distributed on an acreage basis:*

First *Rowan & Nichols* case—none (the allowable above the flat per well allowable being distributed on the basis of 2.32% of the hourly potential capacity of each well).

Second *Rowan & Nichols* case—less than 25% (the balance of the allowable above the 75% distributed on a per-well basis being distributed on a formula involving well potentials, sand thickness, and bottom-hole pressure, as well as acreage).

Present case—50%.

(c) *Differences in allowables granted to wells on small tracts and large tracts:*

First *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable, determined by well potential and not by acreage of tract—25 barrels (See Record in that case, No. 681, October Term, 1939, p. 983).

Second *Rowan & Nichols* case—minimum allowable to all wells capable of making it—20 barrels; highest allowable—50 barrels (See Record in that case, No. 219, October Term, 1940, p. 325).

Present order—allowable to well on smallest tract—46 barrels; allowable to well on 40 acres—184 barrels.

To summarize, the wells on larger tracts fare much better under the formula in this case than they would have fared under the orders involved in either of the *Rowan & Nichols* cases. The *per well factor,* which favors the smaller tracts, is only 50% in this case as compared with 98% in the first *Rowan & Nichols* case and 75% in the second *Rowan & Nichols* case; the *acreage factor,* which favors the larger tracts, is 50% in this case, as compared with no allowable on this basis in the first *Rowan & Nichols* case and less than 25% in the second *Rowan & Nichols* case; and the wells on the smallest tracts receive only 25% of the allowable of wells on the largest tracts in this case, whereas in the first *Rowan & Nichols* case the wells on the largest tract might or might not receive any more than the well on the smallest tract, depending on the potential of the well, but in no event would a well with the minimum allowable receive less than 80% of the maximum well allowable, and in the second *Rowan & Nichols* case, the minimum well allowable was not less than 40% of the allowable granted to the well having the largest acreage and all other factors in its favor.

Nor is there any essential difference between the basic contentions of the appellants here and the claims of the complainants in the earlier cases. In the first *Rowan & Nichols* case, this Court states the complainant's contention as follows (310 U. S., at p. 578):

> "Only an allocation based on acre-feet of sand or its equivalent would be a reasonable means of measuring the oil in place beneath the respondent's leases; and

any formula failing to do this takes respondent's property without due process of law."

In the present case, the suit was brought by Humble Oil & Refining Company, seeking a judgment "decreeing void and invalid" any orders of the Railroad Commission "which deny to Plaintiff the right to produce substantially the total daily allowable that the recoverable oil in and under its property bears to the recoverable oil in the field . . ." (R. 12-13).

The plaintiff interveners, Floy K. Williams, et al., who are royalty owners in Humble leases, adopted the allegations in the Humble's petition (R. 17) and likewise prayed that the court decree "void and invalid" any rules or regulations of the Railroad Commission which deny to the operators of wells on interveners' said properties "the right to produce substantially the proportion of the total daily allowable that the recoverable oil in and under the interveners' several properties bears to the recoverable oil in the field . . ." (R. 23).

There is no substantial difference between the claim that proration should be on the ground of acre-feet of sand and the claim that it should be on the basis of estimates of recoverable oil, because the estimates of recoverable oil relied upon by the appellants in this case were simply arrived at by multiplying the estimated number of acre-feet of sand beneath a lease by a constant "recovery factor" of 500 barrels per acre-foot (R. 574-575). In other words, any proration order, to be in proportion to recoverable reserves as estimated by appellants, would also have to be in proportion to their estimates of acre-feet of sand.

As in the *Rowan & Nichols* cases, the estimates of "reserves" and "drainage" are uncertain and conjectural at best. Many uncertain factors are involved, as stated in the opinion of the Court of Civil Appeals. The Humble's

present estimates of recoverable reserves vary by 21% from their original estimates made soon after the field was first opened (R. 930). Mr. Davis, the Humble's chief geologist, admitted that his method of calculating reserves and drainage had never been verified as against actual production so as to tell whether it was 20% or 30% or 50% wrong (R. 880). With regard to recoverable oil in any lease, Mr. Davis admitted that an estimate which was only 20% or 30% above or below the true facts would be "reasonably close" (R. 841-842). This may be contrasted with the fact that Humble's percentage of the allowable is only about 5% less than its estimates of its percentage of the total reserves (71.4% as against 76.5%). Mr. Davis furthermore admitted that the calculations appearing in Humble's exhibits, where "drainage" is calculated down to the exact barrel, are merely "a matter of accounting" (R. 628) and Mr. Davis furthermore admitted that in figuring the "drainage" on any lease, *he could easily be wrong in his estimates by a million barrels, one way or the other* (R. 632-633). These inherent uncertainties in calculations and estimates are not due to any want of experience or ability on the part of Humble's experts, but to the fact that estimates of this kind cannot be made except within very wide limits of possible errors, even by the most competent experts.

Carried to its logical conclusion, appellants' contention would mean that the townsite operators would be permitted to produce currently and ultimately only in proportion to estimated reserves in place. This would mean that the allowable production of a well on a small townsite tract would be only about one-half of one barrel per day (R. 653) and this allowable would not, of course, be sufficient to pay expenses (R. 655). In the state courts, and also apparently in this Court, the appellants have shrunk from carrying their argument to its logical conclusion and have suggested

that the proration order would be valid if the acreage factor was increased to say 60% and the per well factor reduced to say 40% (See Humble's Jurisdictional Statement, p. 13, R. 2134; and Floy K. Williams, et al., Jurisdictional Statement, p. 10, R. 2183). After all is said and done, therefore, the present suit is one where appellants have asked the courts to substitute their discretion for the discretion of the Railroad Commission and, in effect, to direct the Railroad Commission to add a little more weight to the acreage factor in its formula, thereby further restricting the townsite operators and further increasing the allowable of the Humble wells. The state courts have held that this is a matter which is properly within the discretion of the Railroad Commission and is not a matter for judicial interference. We can see no reason for this Court to depart from the rule which it stated in the second *Rowan & Nichols* case (311 U. S., at p. 576), that, ". . . —it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."[3]

Other considerations are referred to in the opinion of the Court of Civil Appeals, which support the reasonableness of the Commission's order. A factor which has universally heretofore been recognized as being proper in proration formulas is *the number of wells* on each lease. The cost of the drilling of these wells is a large part of the investment which is necessary in order to recover the oil from its subterranean reservoir. Humble has drilled only 61.82% of the wells in the field, but it is permitted to recover 71.4% of the total allowable, or approximately 10% more than it

[3] Compare the statement by the Supreme Court of Texas in *Trapp* v. *Shell Oil Co.*, 198 S. W. (2d) 424, 432: "In such an appeal it is not for the trial court to substitute its judgment for that of the Railroad Commission on controverted issues of fact."

would be enttiled to receive on a pre-well basis of allocation (R. 761, 1260). By reason of the proration formula, the Humble on its large leases is receiving for each of its wells as much as four times the allowable permitted to the townsite wells for each dollar invested in drilling costs. Based on the figures given in Humble's Exhibit No. 4 introduced at the trial (R. 1848), the Humble, under conditions existing at the time of the trial, would receive ultimately an average estimated production of about 1,310,000 barrels of oil per well outside of the townsite, as contrasted with an estimated 470,000 barrels per well approximate ultimate recovery from wells in the townsite.

Another factor which, as the Court of Civil Appeals points out, has always been considered as a proper factor in proration formulas is the *potential capacities of the wells* involved. The official Railroad Commission records show that the Humble wells have only 59.63% of the total well potentials in the field (R. 1261), although Humble is permitted to produce 71.4% of the total allowable from the field, or about 12% of the total allowable more than it would be able to produce if the allowable were distributed on the basis of the potentials of the wells.

3. *Humble's Royalty Owners*

Some of Humble's royalty owners, who are the appellants Floy K. Williams, et al., intervened in the suit in the District Court, adopted the Humble's pleadings (R. 17), and prayed for substantially the same relief as Humble.

Based on the method of calculating "drainage," hereinafter referred to (p. 14), the Humble experts testified that such Humble leases, in which these royalty owners have interests, would not recover the equivalent of the estimated recoverable oil originally in place beneath these leases. The Humble witness was not able to say, however, which of

the leases of these parties would not recover the equivalent of his estimate of the recoverable oil in place (R. 911), although he thought that "most of them" would not recover this amount of oil (R. 911). However, there was no definite evidence as to any one of the royalty owners whether such royalty owner would, during the life of the field, considering his total interests in various leases, be permitted to recover more or less than the recoverable reserves originally in place. On at least two of these leases (Slaughter and Henry leases) the evidence shows lower pressures than in the townsite and the probability that oil is being drained towards these leases instead of away from them (R. 1050).

Actually, the major part of such drainage as will take place will be between Humble leases, due to the migration of oil caused by the expansion of the gas cap as oil is produced. For example, Humble's Exhibit No. 12 (R. 1865) is a table of estimated "losses" of oil by certain Humble leases, which estimated losses total about 60,000,000 barrels, but the same table shows that the drainage to the townsite (including the Humble's 21 wells in the townsite) is estimated at about 30,000,000 barrels. Since it is undisputed that Humble owns practically all of the leases or property outside of the townsite, it is evident from this table that such drainage as will take place will go largely from one Humble lease to another, and not to the townsite.

Dr. Boatright testified that "there is very little, if any, migration from the plaintiff-interveners' leases to the townsite at the present time, and under present distribution of pressure," and that "if we consider the production that has occurred from plaintiff-interveners' leases, together with the oil that is probably in place there today, they have substantially the same amount, or will recover substantially the same amount of oil as they would have recovered under original conditions—that is the total quantity" (R. 1251).

Considering the evidence as a whole, while there was evidence of drainage to some extent to the townsite, there was no evidence that any of the plaintiff interveners would suffer net loss or damage, considering his or her interest in various leases in the field. There was never any specific proof as to the exact nature of the interests which the plaintiff interveners owned in the field, except generally that they owned royalty or other similar interests in Humble leases. In this connection, attention is called to the fact that there has never been any attack upon the spacing rule, which provides for the drilling of one well to 20 acres, except where separate ownership of smaller tracts requires denser drilling. It may be that it would be to the interest of the royalty owners to have the Humble drill its leases more densely, if they have any right to make such requirement under their leases. However, it affirmatively appears that no effort has ever been made to have the Railroad Commission amend the spacing rule to permit closer drilling on large tracts (R. 1766).

Finally, it is submitted that the validity of a proration order must be judged by its over-all effect rather than its effect upon a particular lease or group of leases. A proration order must necessarily be applied to an entire oil field.

After discussing some of the complexities involved in devising and applying spacing and proration rules, this Court said in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 319:

> "For these, and many other reasons based on geologic realities, *each oil and gas field must be regulated as a unit for conservation purposes.*"

It is impossible to devise any plan which may not in particular instances result in inequalities. Proration orders must be judged by a standard of general fairness of the method of allocation. We submit that the reasoning of

Mr. Justice Holmes in the case of *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 434, is in point:

> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvements is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding facts should invalidate an assessment. *Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.* And this has been the implication of the cases."

Unless the foregoing general principle is followed in cases of this kind, it is submitted that the application of proration rules will be practically impossible. Regardless of the general fairness of a proration order, some owner of a small fractional interest in some tract, acting on his own motion or jointly with the oil company which is dissatisfied, might be able to show that by some standard the particular lease in which he is interested is not recovering the amount of oil which it should recover. If this were taken as the sole test of the validity of the proration order, then it might easily happen that some oil company, acting through a royalty owner or a person having a joint working interest with it in a particular lease, might be able to have the proration order set aside, although such order, when considered with regard to the field as a whole, or the leases of the oil company as a whole, is eminently fair and just. It

is submitted that there could be nothing more destructive of uniformity and fairness of administrative action.

It is submitted, therefore, that Humble's royalty owners present essentially the same case as Humble, and that their contentions do not afford substantial constitutional grounds for nullifying the Railroad Commission's action.

II

The Decision of This Case Rests on an Adequate Non-federal Basis

The appellants' contentions with regard to drainage are merely one aspect of their contentions that proration must be on the basis of estimates of recoverable reserves in place. The principal witness offered by the appellants to prove the existence of drainage was Mr. Morgan Davis, Chief Geologist for the Humble, who testified that he calculated drainage in the following manner (R. 669):

> "Now, the drainage was calculated this way: I took the *percentage of the field allowable* that these Townsite leases now have, and subtracted from that the *percentage that they owned in the original recoverable oil,* and, therefore, assume is owned in the present reserve, which gave another percentage figure, and *multiplied that times the field reserve,* which came out with *the amount of oil drained.*"

The respondents did not admit that the method of calculation of drainage used by the appellants was the proper method of calculating such drainage, nor did they admit that the amount of drainage estimated by the Humble to the townsite would actually take place. It was conceded, as stated in the opinion of the Court of Civil Appeals, that net uncompensated drainage is taking place to the townsite in substantial amounts, but it was shown by the uncontradicted testimony of the experts testifying for respondents that

the amount of such drainage was less than would have existed in the absence of any regulation by the Railroad Commission, if each operator were free to fend for himself. In this connection, Dr. Byron B. Boatright testified as follows (R. 1264):

> "My opinion is that under the present proration schedule the Humble leases will obtain a greater percentage of recoverable oil from the Hawkins Field than they would have obtained had the field been allowed to produce without any restrictions whatever."

Upon cross-examination, Dr. Boatright testified that in speaking of unrestricted conditions, he meant production without restrictions either as to the number of wells which could be drilled or as to the amount of oil which could be produced from any well (R. 1402). He further explained that his opinion was based upon the proposition that the townsite, being located in the very best portion of the field, and with very thick and permeable sands, and with wells having very high potentials, under unrestricted conditions would be able to recover "more oil if the restrictions were taken off than it would produce under the present Railroad Commission order" (R. 1265).

The proration order of the Railroad Commission therefore does not *cause* drainage, since drainage would take place under unrestricted conditions. It is true that by changing the proration order the Railroad Commission might *reduce* drainage, but this would amount to altering the relative rights of the parties as they existed under unrestricted conditions and thereby depriving townsite operators of the right to capture migratory oil.

This Court in the *Rowan & Nichols* cases took notice of the fact that the Texas law of property in oil and gas includes not only the rule of ownership in place, but also the rule of capture, which is recognized as a property right. (See 310 U. S., at p. 580.) This rule of property was

stated by the Supreme Court of Texas in *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 940, as follows:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership from oil and gas in place should be considered in connection with *the law of capture*. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and *this is a property right.*"

More recently, the Supreme Court of Texas has reaffirmed the same proposition as follows, in the case of *Corzelius* v. *Harrell*, 143 Tex. 509, 186 S. W. (2d) 961, 964:

> "The rule in this State recognizes ownership of oil and gas in place, and gives the lessee a determinable fee therein. It is also held that such rule should be considered in connection with *the law of capture, which is recognized as a property right*, and both rules are subject to regulation under the police power of this State."

Appellants in this case ignore the existence of the rule of capture as a property right under the decisions of the Supreme Court of Texas and thereby appellants rest their case upon a false premise. Their whole case is based upon the proposition that a denial to them of a recovery in proportion to the estimated oil in place beneath their leases is a denial of their property rights. The Texas courts, in this case, as in other cases, have held that this is not a correct statement of the appellants' property rights. Texas property law does not guarantee to Humble and its royalty owners the oil in place beneath its leases or insure it against drainage. If the owners of townsite properties under unrestricted and unregulated conditions, by virtue of favorable location upon the structure, would have been able to drain oil from other properties, then the Texas courts have held that this natural advantage is a property right and that

the Railroad Commission, in allocating the allowable production under restricted and regulated conditions, must take this property right into account. For example, in *Railroad Commission* v. *Magnolia Petroleum Co.*, 169 S. W. (2d) 253, it was held by the Texas Court of Civil Appeals that it would be confiscatory to deny to the oil company the right to share in the migration of oil which would naturally move to its lease by reason of physical forces in the reservoir, and that the Commission could not limit it to a recovery merely of the oil in place beneath its lease.

The effect of the argument made by Humble and its associates is that they contend that the Railroad Commission of Texas must, in enforcing restricted drilling and production, change the Texas law of property in oil and gas so as to restrict each operator to the oil in place beneath his lease. The Texas courts have held that this is neither necessary nor proper under the Texas statutes nor under the Texas law of property. On the question of the extent of the appellants' property rights in oil, the holding of the Texas court is final. In *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655, 657, this Court said, speaking through Mr. Justice Stone:

> "There being no question of evasion of the constitutional issue, . . . this court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. . . .
>
> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent.
>
> "We accept as conclusive the state court's view of the nature of the rights of riparian owners. We

therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth amendment."

See also *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540.

It is generally conceded that by the joint operation of the well-spacing and proration orders, a larger total recovery of oil will be achieved. Humble and its associates do not assert that they will recover a *smaller amount* of oil than they would have recovered in the absence of any restriction by the Railroad Commission. Nor, on the other hand, do they assert that *the percentage of the total recovery* which they now receive is less than the proportion which they would have received under unrestricted conditions. What they in effect ask for is, first, that the property right of small operators to capture migratory oil should be nullified, and, second, that substantially all of the benefits resulting from conservation regulations be handed over to the owners of large tracts. Since Humble and its associates are not receiving less oil than they would receive under unregulated conditions, nor a smaller proportion of the total recovery, their property rights under the Texas law are not being denied to them. This case therefore rests upon an adequate nonfederal ground, and, under established practice, the appeal should be dismissed. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157; *Utley* v. *City of St. Petersburg*, 292 U. S. 106.

Conclusion

Although the appellants have "formally drawn in question" the validity of the Railroad Commission's proration order under the Fourteenth Amendment, it is submitted that this Court should dismiss or affirm the case because "it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in

character" (See *Zucht* v. *King*, 260 U. S. 174, 176) because (1) the questions raised by the appellants have been so "explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy." (See *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311), and (2) "the decision of the state court sought here to be reviewed was based on a nonfederal ground adequate to support it." (See *Bell Telephone Co. of Pennsylvania* v. *Van Dyke*, 296 U. S. 533, 534.)

WHEREFORE, appellees, the Railroad Commission of Texas and its members and the Attorney General of Texas, and Chas. F. Ashcroft, et al., respectfully pray that the appeal be dismissed or that the judgment of the Court of Civil Appeals of Texas be affirmed upon this motion.

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